

# Decisions of Interest

AUGUST 7, 2023

## CRIMINAL

### SECOND DEPARTMENT

#### ***People v Hines*** | August 2, 2023

REPUGNANT VERDICT | JURY RECONSIDERATION PROPER

The defendant appealed from a Westchester County Court judgment convicting him of 2<sup>nd</sup> and 3<sup>rd</sup> degree robbery, 2<sup>nd</sup> degree assault, 4<sup>th</sup> degree grand larceny, and 5<sup>th</sup> degree CPSP after a jury trial. The Second Department affirmed. Although the jury's verdict was repugnant as to two counts based on the jury charge, it was not improper for County Court to explain the error, reread the elements of the repugnant counts, and direct the jury to reconsider those counts.

[People v Hines \(2023 NY Slip Op 04139\)](#)

### APPELLATE TERM

#### ***People v Hamizane*** | 2023 WL 4852253

"UNRELATED" POLICE DISCIPLINARY RECORDS | DISCLOSURE REQUIRED

The People appealed from a Nassau County District Court order that declared their COCs improper and granted the defendant's motion to dismiss the accusatory instrument. The Appellate Term, Second Department affirmed. The People's failure to exercise due diligence to determine the existence of police disciplinary records before filing their COCs rendered the COCs invalid. The People are obligated to disclose whether disciplinary records exist for every officer listed as a potential witness, even if the records relate to a different case. Impeachment evidence is not limited to the subject matter of the pending charges. The Nassau County Legal Aid Society (Tammy Feman and Argun M. Ulgen, of counsel) represented the defendant.

[People v Hamizane \(2023 NY Slip Op 23233\)](#)

### TRIAL COURTS

#### ***People v Gravesande*** | 2023 WL 4921261

RODRIGUEZ | ID NOT CONFIRMATORY

Following a *Rodriguez* hearing, Kings County Supreme Court found that an officer witness was not sufficiently familiar with the defendant as to deem his identification of her confirmatory. The defendant was charged with 1<sup>st</sup> degree assault arising from an incident that occurred on December 2, 2022. An NYPD officer testified that, on December 2, 2022, the Brooklyn Transit Robbery Squad sent him a wanted flyer and asked if he recognized anybody. He thought the woman depicted on the flyer looked familiar, so he reviewed his body worn camera footage and confirmed that he had stopped her for not paying her fare

on April 29, 2022. The entire interaction occurred over seven months prior and lasted only six minutes. The officer's memory of the defendant was "fleeting at best." Fink & Katz, PLLC (Jonathan A. Fink, of counsel) represented the defendant.

[People v Gravesande \(2023 NY Slip Op 50804\[U\]\)](#)

***People v J.S.*** | 2023 WL 4854761

TRAFFIC STOP | EVIDENCE SUPPRESSED | OFFICER TESTIMONY INCREDIBLE

Kings County Supreme Court granted the defendant's motion to suppress physical evidence. The defendant was charged with 2<sup>nd</sup> degree CPW, criminal possession of a firearm, 7<sup>th</sup> degree CPCS, and improper windshield coating. An NYPD officer stopped the defendant's car for excessively tinted windows and failing to signal and ordered all occupants out of the car. The officer shined his flashlight and saw a baby bottle in the rear of the car containing what looked and smelled like codeine. The officer searched the vehicle and found a loaded firearm in the front driver's side panel. The officer's testimony about the location of the baby bottle was inconsistent and incredible. At the grand jury he said that the bottle was inside the rear driver's seat pouch—not in plain view. In any event, the plain view doctrine was inapplicable. The incriminating nature of the bottle's contents was not immediately apparent. Dawn M. Florio represented the defendant.

[People v J.S. \(2023 NY Slip Op 23234\)](#)

***People v Martinez*** | 2023 WL 4833756

SUPPRESSION GRANTED | NO REASONABLE SUSPICION

Kings County Supreme Court granted the defendant's motion to suppress physical evidence after a hearing. A detective testified that he stopped the defendant and his friend for jaywalking in a high crime area. As he approached, the defendant moved his bag in front of his left pants pocket, which was bulging and hanging lower than the right. The detective immediately frisked the defendant. He felt a metal, L-shaped object and saw what appeared to be the handle of a gun sticking out. The detective reached into the pocket and removed a gun. The detective's testimony did not establish reasonable suspicion of criminal activity to justify the frisk and search. The bulge in and the sagging of the defendant's pocket could have been anything.

[People v Martinez \(2023 NY Slip Op 50773\[U\]\)](#)

***People ex rel. Jaeb v Martuscello*** | 2023 WL 4876277

LESS IS MORE | HABEAS CORPUS | RELEASED

The petitioner filed a writ of habeas corpus claiming that he was being unlawfully detained on a parole warrant arising from his Virginia convictions for reckless driving and misdemeanor assault. Dutchess County Supreme Court sustained the writ and ordered his release. Because the Virginia statutes were not analogous to misdemeanors under NY law, the petitioner's convictions qualified as technical violations under the Less is More Act, requiring his release. The Dutchess County Public Defender (Lauren A. Jaeb and Thomas N.N. Angell, of counsel) represented the petitioner.

[People ex rel. Jaeb v Martuscello \(2023 NY Slip Op 23236\)](#)

***People v S.E.*** | 2023 WL 4854847

CPL 30.30 | FELONY CONVERSION | DISMISSED

The defendant moved to deem the reduction of felony complaints invalid pursuant to CPL 180.50 and for CPL 30.30 dismissal. Queens County Criminal Court granted the motion.

The defendant was originally charged with felony counts of 2<sup>nd</sup> degree strangulation, aggravated criminal contempt, and 1<sup>st</sup> degree criminal contempt, along with other misdemeanor charges. The People filed several documents off-calendar, including a motion to modify the felony counts which, if granted, would have resulted in the top charge becoming a class A misdemeanor. The People's motion did not stop the speedy trial clock; proper reduction did not occur until the next in-court appearance, after the 30.30 period had expired. The People failed to avail themselves of several options to add or reduce charges prior to the expiration of their speedy trial time. Queens Defenders (Isabel Mcquarrie, of counsel) represented the defendant.

[People v S.E. \(2023 NY Slip Op 50797\[U\]\)](#)

***People v Hughes*** | 2023 WL 4921538

30.30 | PREJUDICE AND ADVERSE CONSEQUENCE | DISMISSED

The defendant moved for CPL 30.30 dismissal of misdemeanor charges based on the People's failure to disclose body worn camera records for four responding officers. Richmond County Criminal Court granted the motion. The People admitted their failure to turn over discoverable materials but argued that the defendant was not prejudiced since hearings had not yet started. Prejudice and the adverse consequence clause of CPL 245.50 (1) relate to sanctions under CPL 245.80; they have no application to trial readiness determinations. The Legal Aid Society of NYC (Marion Elizabeth Campbell, of counsel) represented the defendant.

[People v Hughes \(2023 NY Slip Op 50806\[U\]\)](#)

## FEDERAL

### SECOND CIRCUIT

***J.S. v DOCCS*** | August 3, 2023

FREE PUBLIC EDUCATION | INCARCERATED "CHILD"

The plaintiff appealed from a District Court–WDNY judgment dismissing his suit against DOCCS for attorneys' fees and costs under the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA). The IDEA permits a discretionary award to a prevailing party who is a parent of a child with a disability between the ages of 3 and 21. The plaintiff—an incarcerated 20-year-old with a disability—brought a successful administrative proceeding alleging that DOCCS denied him a free appropriate public education in violation of the IDEA. The District Court dismissed the complaint for failure to state a claim, reasoning that the plaintiff was not a "parent" under the IDEA. The Second Circuit disagreed and concluded that the IDEA permits a court to award fees and costs to the plaintiff as "an individual who is legally responsible for the child's welfare"; as a child with disability under age 22 and without representation by a guardian, parent, or appointed individual, he prevailed on his own behalf. Disability Rights NY (Benjamin Taylor, of counsel) and Prisoners' Legal Services (Andrew Stecker and Maria E. Pagano, of counsel) represented the appellant.

[J.S. v DOCCS \(Docket No. 21-2447\)](#)

## SIXTH CIRCUIT

***United States v Liggins*** | August 3, 2023

RECUSAL DENIED | UNCONSTITUTIONAL

The defendant appealed from a Michigan judgment convicting him of drug possession offenses. The Sixth Circuit reversed. At a pretrial hearing, the trial judge said that the defendant “look[ed] like a criminal to me” and was doing “what criminals do . . . he’s playing games with the Court.” The day before trial was scheduled to begin, the defendant unsuccessfully sought recusal of the judge pursuant to 28 USC § 455 (federal judges must recuse themselves where their impartiality might reasonably be questioned). That was an abuse of discretion. Under the Due Process Clause, recusal is required when, objectively speaking, the probability of actual bias is too high to be constitutionally tolerable. An unconstitutional failure to recuse is structural error and thus not amenable to harmless error review. The Sixth Circuit was “highly concerned” by the judge’s remark that the defendant (a Black man) “looks like a criminal to me,” which raised the specter of racial bias. The trial court also abused its discretion by denying the defendant permission to speak when he sought to explain his dissatisfaction with counsel. The matter was remanded for a new trial before a different judge.

[United States v Liggins \(No. 22-1236\)](#)

## FAMILY

***People v M.S.*** | 2023 WL 4987631

JD | SUPPRESSION GRANTED | OFFICER TESTIMONY INCREDIBLE

The respondent, who was charged with possession of a loaded pistol, sought suppression of the gun. Following a *Mapp / Dunaway* hearing, New York County Family Court granted the motion and dismissed the JD petition. A plainclothes police officer claimed that he saw an L-shaped object in the respondent’s coat pocket as the respondent was walking on the street. He approached the respondent, who ran away shortly afterwards. The officer pursued him and heard him drop an object that made a metallic clinking sound. The respondent was handcuffed, and a pistol was found underneath a nearby car. However, the respondent was wearing a winter bubble jacket, and the officer’s testimony that he could see an L-shaped object in the pocket of the jacket was not credible. Observation of an indiscernible object in a jacket pocket did not establish reasonable suspicion to pursue the respondent after he fled. Cynthia Luz Rivera represented the respondent.

[People v M.S. \(2023 NY Slip Op 50819\[U\]\)](#)

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